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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Federal-State Joint Board on)
Universal Service)

CC Docket No. 96-45

Promoting Deployment and Subscribership)
in Unserved and Underserved Areas,)
Including Tribal and Insular Areas)

Western Wireless Corporation, Crow)
Reservation in Montana)

DA 99-1847

**OPPOSITION TO WESTERN WIRELESS PETITION FOR RECONSIDERATION
OF PROJECT TELEPHONE COMPANY AND RANGE TELEPHONE COOPERATIVE**

Project Telephone Company and Range Telephone Cooperative ("Project and Range"), pursuant to 47 C.F.R. § 1.429(f), hereby oppose the Petition for Reconsideration ("Petition") of the Twelfth Report and Third Order¹ in this proceeding filed by Western Wireless Corporation ("Western Wireless") on September 5, 2000 for the reasons set forth below:

**I WESTERN WIRELESS' PROPOSED SUBSTANTIVE STANDARD DOES NOT
PROPERLY RESOLVE THE LEGAL ISSUES REGARDING STATE
JURISDICTION**

- A. "Targeting" service to tribal lands does not provide a basis for FCC jurisdiction under Section 214(e)(6)

¹ Federal-State Joint Board on Universal Service; Promoting Deployment and Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas, CC Dkt. No. 96-45; Western Wireless Corporation, Crow Reservation in Montana, DA 99-1847, *Twelfth Report and Order, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, FCC 00-208, rel. June 30, 2000 ("Order").

The Commission's authority to designate Eligible Telecommunications Carriers ("ETC") extends only to carriers which provide service not subject to the jurisdiction of a State commission. 47 U.S.C. § 214(e)(6) The Commission's Order adopted procedures for determining the existence of state jurisdiction under which applicants asserting lack of state jurisdiction would generally file first with the state commission, except that carriers seeking ETC designation on tribal lands may petition the Commission directly.² In such cases the Commission will first determine its jurisdiction, then address the merits.³

The Commission emphasized that jurisdictional determination regarding reservations involve a legally complex and fact-specific inquiry, informed by principles of tribal sovereignty, federal Indian law, treaties, as well as state law. To illustrate this complexity, the Commission quoted the Supreme Court's statement that "there is no rigid rule by which to resolve the question whether a particular state law may be applied to an Indian reservation or to tribal members."⁴ The Commission correctly rejected the contention that Section 214(e)(6) grants it blanket authority to

² The Order and Western Wireless' petition use the term "tribal lands" which the Order defined as including not only land within the boundaries of reservations, but also areas designated by The Bureau of Indian Affairs ("BIA") as "near reservation." Whatever tribal sovereignty issues may be relevant for purposes of Section 214(e)(6), these issues do not extend to "near reservation" areas. Accordingly, this Opposition will use the term "reservation" except where the context requires otherwise.

³ Order at 48, para. 95.

⁴ Order at para. 108, citing *White Mountain Apache Tribe v. Bracker*, 448 U.S. 135, 142 (1980).

make ETC designations regarding carriers serving reservations.⁵ The Commission therefore placed the burden of proof on an applicant to demonstrate that it is not subject to state commission jurisdiction and required the applicant to provide fact-specific support of its claim including any relevant case law, statutes and treaties.⁶

On reconsideration, Western Wireless proposes that the Commission adopt a substantive standard for resolution of jurisdictional questions that is inherently and completely inconsistent with the conclusions described above, and which is entirely unsupported by any analysis demonstrating the Commission's conclusion was incorrect.⁷ Instead of a "particularized, legal and fact-specific inquiry," the proposal would, in effect, determine jurisdiction solely on the basis of the carrier's description of its service offering and the support of the tribe. Western Wireless fails to explain what the difference in *jurisdictional significance* might be between a situation where a carrier "provides" service on reservation and a carrier which "targets" service to a reservation.

It is no doubt true that this "standard" would remove uncertainty for carriers, but it does not resolve the legal issues described by the Commission in the Order, and at greater length in the

⁵ Order at para. 122.

⁶ Id.

⁷ Because the Western Wireless Petition does not directly contradict the Commission's legal conclusion and makes a new proposal, the Western Wireless proposal more properly should have been filed as a petition for rulemaking.

NPRM. Western Wireless' main response is the claim that a state's interest in regulating universal service provided exclusively or predominantly on Indian reservations under federal programs is quite limited.⁸ Western Wireless would eliminate entirely any consideration of the state law, and the variations in federal laws and treaties applicable to different reservations.

Specifically, Western Wireless proposes that instead of a particularized inquiry, that the Commission should conclude it has jurisdiction under Section 214(e)(6) where the carrier proposes service "directed" to a reservation. A carrier's service would be considered "directed" if it (a) has an agreement with the tribe or some indication of tribal support, (b) the service is "targeted" to the reservation, and (c) the carrier certifies compliance with Section 254(e). A service would be considered "targeted" if it met any one of four criteria: (1) geographically targeted exclusively or primarily to tribal lands, (2) the service is different than that offered elsewhere, (3) the applicant has a special organizational structure for the tribal area, or (4) the applicant is a CMRS provider.⁹

Whether or not a carrier can show that it meets some or all of these criteria provides no material assistance with resolution of the issue of whether a state has jurisdiction to regulate a

⁸ Petition at 11.

⁹ Petition at 5-6. These criteria are intended to be non-exclusive. The CMRS provider criteria does not state specifically whether the carrier must provide CMRS *service* on the tribal lands.

non-tribal carrier providing service on a particular reservation.¹⁰ First, in virtually all instances, any carrier providing service on a reservation is going to have some kind of agreement with the tribal government in order to physically operate on the reservation. Certainly the Commission is obligated to consider the opinion of the tribal government of a reservation on the question of whether the state has jurisdiction to regulate telephone service on the reservation. On the other hand, the existence of a service agreement or expression of support, which is all that Western Wireless proposes, is, to the extent it has any relevancy, confined to the question of whether the ETC designation should be granted; consent or collaboration has no legal significance with respect to the issue of jurisdiction.

Second, the proposed “targeting” criteria do not provide any useful information on the question of jurisdiction. Whether or not a non-tribal carrier offers service solely or primarily on a reservation is a matter of the carrier’s choice as to where it will hold out to provide service, and says nothing about whether the state commission has jurisdiction to regulate that service. The same is true regardless of how the rates or other aspects of service are marketed. The fact that a carrier serves only on a reservation, partially on a reservation, or offers a somewhat “different” service on a reservation than off, does not in reduce a state’s interest in regulating the service. Nor do any of these factors serve to reduce whatever authority a state may have. Likewise, the carrier’s operational or organizational structure is of no relevance unless the carrier truly is a

¹⁰ One of the particular questions to be resolved in each case may be the status of service provided to non-Indians living on fee land within the boundaries of a reservation.

subdivision of the tribal government or is tribally owned company.¹¹

Third, a requirement that a carrier certify that it is compliance with Section 254(e) is totally irrelevant to state commission jurisdiction. Compliance with the statute is mandatory, not optional, for all carriers, regardless of whether or not they are subject to the jurisdiction of any state.

Finally, whether or not the carrier is a CMRS provider has no bearing on whether the state commission has jurisdiction to designate it as an ETC.¹² Despite the Commission's repeated rejection of this theory, Western Wireless attempts to rephrase the same argument in a slightly different form in the apparent hope that the Commission may one day forget and agree with it. The Commission was quite clear in its agreement with NTIA that there is no support whatever for the notion that by adopting Section 214(e)(6), Congress intended to remove state jurisdiction to grant ETC designation to wireless carriers.¹³

¹¹ In some states, such as Montana, carriers organized as cooperatives are not generally subject to state commission jurisdiction, however, the Montana PSC does have jurisdiction to determine ETC status of any carrier. Section 69-3-80, Mont. Code Ann.

¹² Order at 54, paras. 109-110. Western Wireless implies that because a carrier offers a commercial mobile service it is somehow immunized by Section 332(c)(3) from state regulation of other services which are not commercial mobile services. Of course many carriers offer a variety of services, such as local exchange, interexchange and wireless, by this argument they would all be free of state regulation. In any event, this issue is pending before the Commission.

¹³ Order at para. 109. As has been made clear repeatedly, Congress intended no change in jurisdiction whatsoever by adopting Section 214(e)(6) and clearly would not have

Adoption of a standard which would determine jurisdiction solely on the basis that a carrier “targeted” a reservation would create an anomalous situation in which some carriers serving a reservation would be subject to state jurisdiction and some to FCC jurisdiction. Where the territory of a Rural Telephone Company is involved, the state commission and the FCC would each be required to make public interest determinations regarding designations of second ETCs in the same territory.

B. Jurisdiction Is Independent Of, and a Condition Precedent To, Consideration of Any Public Interest Criteria.

Since its first actions under Section 214(e)(6), the Commission has recognized correctly that it cannot proceed to consider an ETC designation application unless and until it has established its jurisdiction.¹⁴ Certainly the public interest will be served to the extent the Commission can reduce uncertainty and improve the efficiency of its decision making process. It may also be the case that there is a “dire need for additional telecommunications services” on some other reservations, but that is not true on the Crow Reservation.¹⁵ Neither procedural efficiency

adopted it on suspension of the rules if it had not been for very explicit assurances from the sponsors that no jurisdictional change would result. Western Wireless’ suggestion (Petition at 6, n. 9) that the Commission should find a distinction for carriers serving tribal lands is totally without support, particularly as the Congressional debates focused on tribal situations.

¹⁴ *Procedures for FCC Designation of Eligible Telecommunications Carriers Pursuant to Section 214(e)(6) of the Communications Act*, Public Notice, FCC 97-419, Dec. 29, 1997

¹⁵ *See*, Project and Range Comments in DA 99-1847, Oct. 12, 1999, 3-10 (service is available to virtually all households and is subscribed to by over 70%).

nor the unquestioned urgent need to improve Subscribership on many reservations has any relevance to the question of whether a state commission has jurisdiction to grant ETC status to a particular carrier on a particular reservation.

Western Wireless justifies its proposal to eliminate the “particularized inquiry” on the basis that the Commission has a “general trust relationship” with federally-recognized Indian Tribes and the claim that its proposed standard balances the state’s allegedly small interest in regulation with the tribe’s sovereignty interest.¹⁶ Western Wireless posits that if authority to grant ETC designation on reservations is shifted from the states to the FCC, ETC designations will be facilitated and more expeditiously granted.¹⁷ Therefore, it implies that fulfilment of the Commission’s trust responsibility somehow requires it to assume jurisdiction and preempt any state jurisdiction. While this argument might be relevant to a proposal to Congress to rearrange the federal/state jurisdictional relationships, the Commission must function under the existing law.

II THE COMMISSION SHOULD WORK WITH THE STATES TO DEVELOP A CONSENSUS ON THE COMMON ISSUES INVOLVING JURISDICTION

For the reasons explained above, the Western Wireless proposal is inconsistent with the

¹⁶ Petition at 8-12. The legal justification is stated in four parts, but two are essentially redundant.

¹⁷ Petition at 7. Western Wireless disclaims, however, any intention to “forum shop.”

law which requires a particularized inquiry into questions of state jurisdiction to regulate telephone service on a reservation. Despite the unwarranted accusations that incumbent LECs are merely seeking to maintain the status quo, Project and Range are not unsympathetic to the concerns expressed by Western Wireless regarding uncertainty and delay.¹⁸ Because there are undoubtedly issues that are common to at least many reservations, the Commission should establish a forum involving affected states and NARUC which potentially could lead to consensus on common issues and identification of the relevant factors involved with the particularized issues. A section 410(a) joint board would be one option for such a forum.

Such a forum would permit development of a greater understanding among all parties of the ramifications of a conclusion that a state commission is without jurisdiction on a reservation. Among the issues that should be considered are the validity of the certificates of public convenience and necessity, ETC designations, liability for service standards, reasonableness of rates and practices of existing carriers, and the ability of tribal governments to replicate the functions that state commissions have historically provided. While the answers to these questions will necessarily vary from state to state and reservation to reservation, there would be merit in reaching some common understanding of these issues. Finally, such a forum may determine that an answer satisfactory to all cannot be achieved under the current law and seek consensus for a recommendation to Congress.

¹⁸ Letter from John Stanton, Western Wireless to Chairman Kennard, Sep. 15, 2000

IV CONCLUSION

The Commission should reject Western Wireless' Petition for Reconsideration as inconsistent with the governing law. For the reasons set forth in Section I, above, the proposed standard which would establish FCC jurisdiction to grant ETC designation where a carrier offers a service targeted to a reservation, does not respond to the complex considerations established in 170 years of federal court decisions since *Cherokee Nation v. Georgia*.¹⁹ To address the concerns of uncertainty and delay, however, the Commission should work with state commissions and interested parties to resolve as many common issues as possible, to identify particular issues, and, if necessary, formulate a legislative recommendation.

Respectfully Submitted

Project Telephone Company
Range Telephone Cooperative

By 

David Cosson
Their Attorney

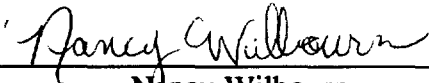
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October 2, 2000

¹⁹ 30 U.S. (5 Pet.) 1 (1831).

CERTIFICATE OF SERVICE

I, Nancy Wilbourn, of Kraskin, Lesse & Cosson, LLP, 2120 L Street, NW, Suite 520, Washington, DC 20037, do hereby certify that a copy of the foregoing "Opposition to Western Wireless Petition for Reconsideration of Project Telephone Company and Range Telephone Cooperative" was served on this 1st day of October 2000, by first class, U.S. Mail, postage prepaid to the following parties:


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